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Shadow Vigilante Officials Manipulate and Distort to Force Justice from an Apparently Reluctant System

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*Shadow Vigilante Officials Manipulate and Distort to
Force Justice from an Apparently Reluctant System, Ch. 10
in*

THE VIGILANTE ECHO:
HOW FAILURES OF JUSTICE INSPIRE LAWLESSNESS

(forthcoming 2018)

By Paul H. Robinson & Sarah M. Robinson

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Paul H. Robinson
&
Sarah M. Robinson

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PREFACE

Vigilantes have long been vilified, often with good reason, as with the racist lynchings of the Klu Klux Klan. But the origin of the term and the original American "vigilantes" in 1850s San Francisco were models of democratic action saving the community from an ineffective and corrupt government. And there has been a long line of groups who could fairly claim their conduct to be morally justified, albeit technically illegal.

In modern societies, citizens give up most of their natural right to defend themselves or to respond to wrongdoing, in return for a promise of protection and justice from the government. But what happens when government breaches that social contract and persistently fails in its promise? There are difficulties with citizens taking matters into their own hands, but it is hard not to empathize with people in desperate situations where law enforcement seems indifferent. And there are some persuasive moral arguments that people can make in support of some forms of constrained vigilantism.

One might hope that serious failures of justice and protection were rare, and that government takes seriously its obligation under the social contract. However, rightly or wrongly ordinary people believe they have reason to doubt the criminal justice system's devotion to doing justice. In a wide range of rules and practices – what might be called the *doctrines of disillusionment* – the criminal justice system seems to many to advertise an indifference to the importance of doing justice: courts that feast on technicalities, treating criminal justice as if it were a game; judicial rules that suppress reliable evidence and thereby let serious offenders go free; decisionmakers allowed to use their discretion to avoid deserved punishment for serious offenses; and criminal law defenses that shield clearly guilty and blameworthy offenders from liability.

Ultimately, the doctrines of disillusionment tend to undermine the criminal justice system's moral credibility with many ordinary people, and that loss in turn undermines the criminal justice system's ability to harness the powerful forces of social influence and internalized norms. In other words, there are not only strong deontological reasons to be sympathetic to moral vigilante but also compelling instrumentalist crime-control reasons to pay attention to ordinary people's disillusionment with a system they see as failing to give sufficient importance to doing justice.

While vigilantism is something considerably more nuanced than the evil incarnate that its Ku Klux Klan paradigm might suggest, it is not so easy to clearly mark out the importantly different categories of moral vigilantes and immoral vigilantes. An attempt to set out a code for the moral vigilante illustrates the complexity of the problem and the fuzzy lines that inevitably remain.

And even if one could construct a clear detailed code of conduct, it is an inevitable weakness of vigilante action that, once the red line of official criminal prohibition has been crossed, it is easy – too easy – for even the well-meaning vigilante to lose track of the boundaries of moral justification. Perhaps even more troublesome, even if the vigilante is successful in staying within the bounds of moral justification given his situation, it is commonly the case that even moral vigilantism can be problematic for

the larger society. The bottom line is that official action is always to be preferred over vigilante action.

But it does not follow that the moral vigilante must simply suffer in silence. First, this may not be possible. Strong feelings of disillusionment may spark action no matter what the law threatens. Further, asking moral vigilantes to suffer in silence is not only a poor crime-control strategy but, more importantly, it ought not to be asked. The government has obligations to its citizens under its social contract and is not free to simply choose not to perform them. The criminal justice system ought to take seriously its obligation to assure that justice is done and crime avoided whenever possible, so that people are never put in the position of having to consider moral vigilantism.

But the real danger is not of hordes of citizens, frustrated by the system's doctrines of disillusionment, rising up to take the law into their own hands. Frustration can spark a vigilante impulse but such classic aggressive vigilantism is not the typical response. More common is the expression of disillusionment in less brazen ways, by a more surreptitious undermining and distortion of the operation of the criminal justice system.

Shadow vigilantes, as they might be called, can affect the operation of the system in a host of important ways. For example, when people act as classic vigilantes or exceed the legal rules for use of defensive force or when officials exceed their authority in dealing with offenders, shadow vigilantes can refuse to report the crime or to help investigators, or can refuse to indict as grand jurors or refuse to convict as trial jurors. Further, frustration with doctrines of disillusionment can lead politicians to urge legal reforms that seem to avoid failures of justice but that also overreach and produce regular injustices.

Shadow vigilantism can also be seen in the conduct of officials within the system, who feel morally justified in subverting the system because they see it as so regularly and indifferently producing failures of justice. Such subversion is apparent, for example, in refusing to prosecute vigilantes, police, or crime victims who stray beyond legal limitations on the use of force against aggressors, in police testilying to subvert search and seizure technicalities (and judicial toleration of it), and in prosecutorial overcharging to compensate for past perceived justice-failures.

The danger of shadow vigilantism is not simply in the systemic distortions that it provokes. The distortions have their own effect in further undermining the system's credibility and its crime-control effectiveness. For example, lenient sentencing provokes mandatory minimums, and search and seizure technicalities provoke testilying, but the excessiveness of mandatory minimums and the lost credibility from institutionalized testilying then in turn provokes "stop snitching" campaigns, which guarantee greater witness intimidation, greater criminality, and less justice.

We would all be better off if this dirty war had never started. Systemic failures of justice, shadow vigilantes' distorting response, and blowback from those distortions, end in more crime and more failures of justice – this is the downward spiral.

The only way to effectively stop that tragic cycle is for the criminal justice system to publicly commit itself to the importance of doing justice, and avoiding injustice, at all costs. That means avoiding application of the doctrines of disillusionment where there is

no compelling societal interest to do so or where the interest could be as effectively promoted through a non-justice-frustrating means.

The only way to prevent the downward spiral of lost credibility is to acknowledge the importance of doing justice both as an essential ideal and as a practical necessity.

CHAPTER 10

SHADOW VIGILANTE OFFICIALS MANIPULATE AND DISTORT TO FORCE JUSTICE FROM AN APPARENTLY RELUCTANT SYSTEM

Frustration with failures of justice, and the shadow vigilante impulse that it provokes, is found not only among civilians but also among criminal justice professionals. And police, prosecutors, judges, and others have an even greater opportunity than civilians to subvert or manipulate the criminal justice process in an effort to force justice from it.

For example, it is not unusual for police to circumvent technical search and seizure requirements by lying in court about the circumstances of the search or seizure – what the police call “testilying.” Prosecutorial shadow vigilantism is shown in, for example, a disinclination to charge civilians or police who make culpable mistakes in confrontations with wrongdoers. It is also shown in prosecutorial overcharging of an offender to compensate for past offenses that went unpunished. And it is clear that judges tolerate much of the above, and add in a few manipulations of their own. These players take the system's repeated failures of justice as their moral justification for subverting and manipulating it – to force from it the justice to which it often seems indifferent.

Consider two examples of police testilying and the circumstances that provoked them.

Police Testilying to Subvert the Exclusionary Rule

Distorting a Warrant Affidavit to Catch a Sexual Predator and Serial Murderer. Bill Bradford is a sexual psychopath.¹ His first sexual crime occurs in 1972 during his mid-twenties. Bradford tries to force his penis into a 17-year-old-girl's mouth and then masturbates onto her breasts. In response to the girl's cries, Bradford shouts that “he always wanted to do it so he did.”²

Two years later, Bradford and a 15-year-old begin an intimate relationship. During the relationship, Bradford beats his girlfriend on a weekly basis, sometimes forcing her to have intercourse with him during the assaults. The girl becomes pregnant. During pregnancy, Bradford tries to kill the baby by slamming her belly into a door and once the baby is born he tries to kill it several more times, twice throwing it against the wall and once by tying a windbreaker around its face. Over the years the pattern continues: Bradford treats a woman brutally, is arrested, convicted, and soon free again.

In the summer of 1984, while out on bail and awaiting trial for rape, Bradford assaults Shari Miller, a twenty-one-year-old struggling to make it on her own. She has held various jobs in the past including being a bartender at the Meat Market, a popular bar in Los Angeles. Miller tells her mother that she is going to get a job as a model for a photographer and heads out at 3 p.m. that afternoon. Bradford goes with Miller into the desert, takes various nude photographs of her, and then strangles her to death. He then mutilates the body, removing her nipples and various other pieces of flesh.

More than a week later an office worker who has parked behind his workplace in the alley notices a foul smell. He spots a large bundle covered by a quilt, soaked in blood, from which a hand is protruding. Identified initially as Jane Doe No. 60, the body is that of Sheri Miller.

Tracey Campbell is a 15-year-old girl who has moved to Los Angeles from Montana with her mother. She is attending a local junior high school. During the summer she is in charge of the housework in the small studio apartment she shares with her mother, sister, brother, and an older male cousin. This is the same complex that Bradford lives in. On July 12, one of Bradford's housemates hears Bradford and Campbell talking and hears Bradford say he has a job for Campbell. Bradford takes her out to that same spot in the desert, photographs her, and then strangles her to death; he leaves the body to rot in the desert heat.

That night, when the rest of Campbell's family arrives home, the apartment is locked and the cleaning has not been done. They ask around the apartment complex to find out if anyone has seen Tracey. When they ask Bradford's housemates, they are told that the two had been together but that he is currently in Orange County. The next morning Campbell's mother files a missing person's report at the police station. Her cousin goes to check in with Bradford but he is still not at home and his car is still missing from the garage. When a friend of Bradford's calls the apartment he is told by one of his housemates that they are worried because Bradford had "taken the little girl next door the previous day and was not yet home."³

On July 14, the LAPD interview Bradford in his apartment concerning Campbell. Bradford tells the officer that she had come to his apartment to use the phone, and that he had then gone and dropped her off to buy cigarettes and hitchhike to the beach. Two days later in a follow up interview he gives an almost identical account and consents to a search of his apartment and car. The police examine items in the living room, kitchen, hall closet and vehicle, but do not find anything significant.

The investigation and search continue. Potential suspects are cleared and leads turn out to go nowhere. Bradford remains the main suspect due to his connection to the girl immediately before her disappearance and his long rap sheet of previous sexual and violent assaults. On July 31, pursuant to a valid warrant, LAPD officers arrest Bradford and execute a more thorough search of his apartment and vehicle. This time, they recover numerous Polaroids and negatives from which they recognize photos of Jane Doe No. 60. The police match the girl in some of the photographs to the dead body they had found earlier in the month and soon determine that Jane Doe No. 60 is Sheri Miller.

Over the course of the next two days, the police interrogate Bradford for over 11 hours. They ask him about his connection to Miller, to which he responds that he had known her for years and that she had wanted to get into modeling. Knowing that he was a photographer, she had asked him to help her build a portfolio. He admits to taking those photographs on July 1 and says he has not seen her since. He claims he was at Huntington Beach on July 4 watching the tall ships. When asked about Campbell he gives a similar account to his earlier statements. On August 3, after being held for three nights, he is released from custody because the police do not have enough evidence to link him to the crimes.

On August 11, a body is found in the desert at the location Bradford is known to have previously visited for a camping trip. The location also matches the background for some of the seized photos of Miller modeling. Five days later, the police formally identify the body as Tracey Campbell. The worst fears of everyone are now confirmed, the police now have a double homicide on their hands. Because the methods of causing death are identical and the location is one known to have been visited by Bradford, the previous suspicions of the police seem to be confirmed.

The police have a problem, however. While it is more clear to them than ever that Bradford is their multiple murderer, they do not have sufficient new evidence that will allow them to obtain a warrant to search his apartment for third time and to arrest him a second time. Yet, they have no other means of making a case against Bradford that will prevent another killing. Their warrant application must have a stronger showing of probable cause for yet another search than they have had in the past.

Sensing that a serial killer might escape their grasp and kill again, Detective Charles Worthen, who assisted with the July 31 search warrant, does what he believes he needs to get the warrant. In the warrant application, Worthen leaves out certain pieces of information. He leaves out information that Miller was seen alive after June 30, even though several of her friends reported this. He asks for authorization to search for a silver spoon ring, blue cut off shorts, and any articles of clothing as seen in a series of attached photographs, even though some of these items are already in police inventory from the previous search of Miller's car. Finally, he mentions the two previous searches only in the appendix rather than in the main application itself. The tactics work and the warrant is granted.

On August 16, the LAPD again arrest Bradford and transport him to the police station to be interviewed. After being read his *Miranda* rights, he initially refuses to speak without a lawyer, but then Bradford waives that right and agrees to an interview. He sticks to his original stories about each girl. When asked how it could be possible that Campbell's body was found almost in the exact same location as the photo shoot for Miller, Bradford responded "I can't explain it to you."⁴ When the police ask if he has murdered either girl he replies "No sir."⁵

Using the newly-issued warrant, the police search his home and vehicle for the third time. In the hall closet they find a wristwatch flecked in paint similar to the one Miller is wearing in some of her photographs. In a closet, they find a portion of white rope, numerous photographs and documents, and several items believed to be owned by Miller. The rope is found to make an impression identical to those in the ligature marks on both victims' necks. They have found the murder weapon. In his automobile, the floor mat in the trunk tests positive with luminol and phenolphthalein, which indicate the possible presence of blood.

As a result of the items seized during the latest search, the collection of evidence against Bradford is very strong. The prosecution now has the murder weapon and several possessions of the victims found in Bradford's house. Bradford is charged with two counts of first-degree murder, goes on trial, and is found guilty of both counts. (During Bradford's closing testimony in sentencing he says, "Think of how many you don't even know about."⁶ The jury sentences him to death. Bradford appeals his conviction, citing the police misconduct in obtaining the final warrant. Some evidence is excluded but Bradford's conviction is affirmed.⁷)

It seems likely that Detective Worthen wrote the application for the final warrant that led to the conviction in a way that was intentionally misleading. Yet, in his own mind, the deception no doubt seemed justifiable, given the justice-frustrating nature of the search and seizure exclusionary rules and the real danger that this sadistic serial murderer-rapist might escape conviction and punishment.

Exceeding Search and Seizure Rules to Catch a Child Murderer. In the Columbia Heights section of Washington D.C., on the evening of November 1, 1969, five-year-old Penny Sellers and her older sister Denise visit the apartment of their grandfather, Robert

Dennis. Also present there is a neighbor, William Sheard, who gives the girls candy and lets them play with his puppy, as he has done in the past. Around 9:30 p.m., the girls have moved to watch television in the basement apartment of a friend. Penny leaves to go back to Sheard's apartment to play with his puppy again. It is the last time her family ever sees her.

After about an hour, her grandfather asks Sheard if he knows where Penny is and is told that she "had gone up the street with a man."⁸ At the grandfather's request, Sheard calls the police. The police arrive at about 11:00 p.m., having been advised to contact "a Sheard."⁹ Upon meeting Sheard officers are informed by him that a child is missing, that he has telephoned the police, and that he had been the last person to see the child. One hour later, police find Penny's body amid debris on the floor of a garage near the apartment building. Penny's genital area is exposed and bloody. A later autopsy reveals that she has been raped and died due to asphyxiation from suffocation. Police also find her underpants in the alley near the garage and one of her shoes on the back porch of the house next door.

The police chief orders a lock down of the apartment complex and for all male residents to be questioned. During the question, officers are to also make a visual search for blood in the open living areas of their apartments. Officers Shuler and Jones are assigned to question Sheard's apartment, as he is apparently the last person to see Penny alive.

Officer Shuler knocks on the door and identifies himself as a police officer. When Sheard answers the door, they immediately become suspicious because Sheard has fresh scratches on his face, looks as though he has just taken a bath, is wearing fresh but heavily wrinkled clothing, and his overall behavior is odd. Believing that Sheard might hide or destroy vital evidence if they wait to get a warrant, the officers are anxious to enter and examine his apartment.

Officers Shuler advises Sheard that a small child has been killed and that he and his partner, Officer Jones, would like to come inside to talk with him. Sheard later testifies that he did not authorize the officers to come into his apartment but that they simply barged in without permission. Officer Shuler testifies that Sheard was "friendly" and said, "Come in, come in, I'd like to do all I can to find out." Later, however, Officer Shuler testifies during a motion to suppress evidence that he does not remember exactly what Sheard had said. Officer Jones testifies, "Well, he just stepped back. And I don't remember if he said, come in, but I was under the *impression* that we were to enter the room by his attitude."¹⁰

After the officers enter the apartment, they observe that the room is in a state of disarray: candy is strewn about on the floor and a large damp burned area is evident on the mattress of a bed. One of the officers leaves to summon their superiors and the other conducts a plain view search of the area. The officer supposedly finds in plain view a pair of dark green pants with blood stains sitting perfectly on top of a hamper.

Authorities seize the pants and other evidence and take Sheard to the nearby precinct. A benzidine test reacts positively to the pants thing is being blood. A test of Sheard's right hand and penis also reveals blood. Chemical analysis reveals blood on Sheard's jacket, the dark green slacks, the blanket and bedspread, and Penny's dress and slip is type O blood (Sheard blood is type A blood; Penny's was type O). Fibers from the bedspread and blanket are discovered on Penny's dress and slip, on all of Sheard's seized clothing, and in scrapings from the heads of both Sheard and Penny.

With the staggering amount of evidence against Sheard, a grand jury indicts him on February 2, 1970 for the rape-murder of Penny. The indictment includes four counts: felony murder, first degree murder, rape, and taking indecent liberties with a minor. Sheard is found guilty and sentenced to concurrent terms of twenty years to life on the felony-murder count and of ten-to-thirty years on the rape count.

It seems clear that the two officers – and perhaps even their superiors – made a conscious choice to exceed the search and seizure rules and to hide their violation because they believed it was necessary to find the rapist-murderer of a 5-year-old little girl where the evidence of the crime would otherwise quickly be destroyed by the perpetrator.

Police officers morally justify their lying in court to compensate for what they see as improper rules that regularly lead to failures of justice – complex rules that have "metastasized into a dizzying array of formalistic doctrines and subdoctrines."¹¹ Harvard law professor Alan Dershowitz explains, "almost all police lie about whether they violated the Constitution in order to convict guilty defendants."¹² Even police officials concede that police lying in court, especially to justify improper searches, is not uncommon.¹³ It has earned its own label, "testilying." The term was coined by New York City police officers, apparently to help them justify in their own minds why it was different from normal lying under oath – while not legally justified, it was morally justified.¹⁴ "When an officer is deceptive in court, the rationale goes, he is 'not quite lying' but 'not quite testifying truthfully and completely' either. Testilying is seen as a middle ground between pure honesty and pure dishonesty."¹⁵

One Officer caught lying under oath said it was "standard procedure" and used to "counterbalance the loopholes used by drug dealers to evade the police."¹⁶ An empirical study by Myron Orfield in Chicago concludes that "virtually all the officers admit that the police commit perjury, if infrequently, at suppression hearings."¹⁷ The study claimed that up to 76% of the officers surveyed had "shaded" facts in order to establish probable cause.¹⁸ They not only lie occasionally, but, some claim, commit perjury in 20 to 50% of cases where police have to testify regarding Fourth Amendment (exclusionary rule) issues.¹⁹

Most famous among the examinations of police perjury is the 1994 Mollen Commission Report on the New York Police Department: "Police perjury and falsification is a serious problem facing the department and the criminal justice system."²⁰ Such perjury is "probably the most common form of police corruption . . . particularly in connection with arrests for possession of narcotics and guns."²¹

The Mollen Commission Report spoke to the reasons for the officers' willingness to lie: "In their view, irregardless of the legality of the arrest, the defendant is in fact guilty and ought to be arrested."²² It explained that the officers were frustrated with the legal rules that protected criminals from search and seizure, because the rules were perceived as "unrealistic rules of law."²³ Officers also expressed frustration in their "inability to stem the crime in their precinct through legal means."²⁴ They held a strong belief that perjury was acceptable because it was necessary to stem the tide of crime, and such was "'doing God's work' – doing whatever it takes to get a suspected criminal off the streets."²⁵

Other writers have made the same point: "Police view perjury as a necessary means to achieve the ends of justice. Constitutional rules – particularly the Exclusionary Rule – are viewed as technicalities that 'let the criminal . . . go free because the constable has blundered.'"²⁶ One study found that testilying began soon after cases where dismissed under the 1961 exclusionary rule holding in *Mapp v. Ohio*.²⁷ To police, "there is

a deep-seated disregard for what they consider to be silly little laws made by silly little Supreme Court in a backroom far removed from the dangerous streets they are trying to bring order into."²⁸

Presumably judges, like others in the system, are well aware of the testilying. Yet some may share the shadow vigilante sympathy motivating the lying, and thus, while no doubt unhappy about perjury in their court, play along with the game and accept the testimony as sufficient to justify the search or the arrest. As Alan Dershowitz reports, when officers offer perjured testimony, the judge "shakes his head in knowing frustration, but accepts the officers' account as credible."²⁹ A series of interviews revealed that 75% of judges, 100% of public defenders, and 65% of prosecutors "believed that judges sometimes fail to suppress evidence when they know police searches are illegal."³⁰

This is a sad state of affairs but in some ways is a predictable development as the collection of outrageous results from the law's "technicalities" accumulate (as in Eyler, Ignatow, Healy, and other cases in Chapter 3). As the law increasingly loses moral credibility with the community, it becomes increasingly easier for shadow vigilantes to justify the subversion of what they see as an immoral system. It is probably no coincidence that "testilying" is most frequently associated with satisfying the technicalities of search and seizure law. The same officer who feels comfortable lying about which side of a house's threshold he was on when he made a drug seizure, might think it abhorrent to lie about a matter related to the actual guilt or innocence of the defendant.

Just as police officers morally justify their testilying, so too do prosecutors manipulate the system out of frustration with what they see as the system's common indifference to doing justice. This view frequently plays itself out for some prosecutors when they are presented with classic vigilantes trying to provide the justice that the system does not. Consider two examples.

Prosecutor Reluctance to Try Some Vigilantes

Vigilantes Chase Down a Suspected Rapist. On May 31st, 2009, Jose Carrasquillo and a female friend buy four bottles of PCP, some cocaine, and liquor, and party the entire night.³¹ As the party spills into the early hours of the next morning, Carrasquillo's friend decides to go home with another man, infuriating him. He begins prowling the neighborhood of Kensington, a lower income neighborhood in Northeast Philadelphia. Just after 7 a.m. he spots a sixteen-year-old girl walking to school. He approaches her, tells her he thinks she is sexy, and grabs her breast. The student flees to the safety of her school.

An hour later and a few blocks away, Carrasquillo comes across a pair of girls, two sisters. The 11-year-old is dropping the four-year old at daycare. Carrasquillo threatens to shoot the older sister and takes to an isolated alley where he rapes her repeatedly. After he flees, the girl picks herself up and manages to stumble to the street, crying for help. Neighbors find her bloody and screaming in the street and immediately call 911. She is hospitalized for 30 days and undergoes reconstructive surgery to repair the extensive damage inflicted upon her.

Video cameras on the street and schools show Carrasquillo with the girl. He is no stranger to the police as he has been arrested seventeen times in the past, often for drug related charges. Unable to immediately locate Carrasquillo, on June 2 the police post flyers in the area with his photo, stating that he is a person of interest in the recent rape case. Members of the community go out looking for him, worried about the safety of their

children and angry that one of their children has been raped in broad daylight on her way to school.

One group spots Carrasquillo on the street. A nearby shop surveillance camera records the incident. The group of neighbors chase the man down, knock him to the ground, and pummel him with their fists and feet. One man hits him several times with a large board. The police arrive and take Carrasquillo into custody. He is sent to the hospital where he remains in critical condition for several days.

The American Civil Liberties Union pressures local law enforcement to file charges against the community members who beat the rapist, pointing out that the neighbors went beyond simply apprehending and holding Carrasquillo. ACLU attorney Mary Roper states, "It's shocking that the police are not going to do anything in response to what is essentially mob violence against this guy."³²

However, District Attorney Seth Williams, decides not to arrest or press charges against any of the neighbors. John McNesby, president of the local Fraternal Order of Police, explains that the authorities do not endorse this kind of violence, but they also understand the tumult within the community and appreciate their help in taking this "savage beast off the street."³³ Two of the men are actually given a \$11,500 reward for helping to catch Carrasquillo. Mayor Michael Nutter also weighs in on that matter. He echos the Commissioner's sentiments by stating that the city does not condone "vigilantism out in our street, but it's indicative of the anger and compassion that many of our citizens have. It's a further demonstration that Philadelphians care passionately about this city, about our quality of life, and certainly about our children."³⁴

Philadelphia Police Commissioner Charles Ramsey says, "it's something that we certainly don't want people taking the law into their own hands."³⁵ However, he also tells reporters,

To attack an 11-year-old girl and – I mean, he injured her pretty badly. I went to the hospital and saw her today and it's just something that should've never happened. It's good to have him off the street. People can take a sigh of relief. We still have a lot of work to do, but this is an individual who's been in contact with the police numerous times before.³⁶

As the Commissioner mentions, the fact that Carrasquillo had long been a problem that the authorities seemed unable to do anything about helped explain their willingness to quietly condone, and protect, the vigilantes in this case.

No Prosecution of Vigilantes Who Beat a Child Rapist. Jane Doe grows up in the neighborhood of Hubbard Farms in southwest Detroit, raised by her single mother.³⁷ When she is eight years old, her mother dies and neighbors across the street and, in fact, the whole neighborhood pitches in raise Jane, calling her "a daughter of the community."³⁸ The community feels particularly protective of Jane in part because she has Down's Syndrome. She is often be seen on her front porch, dancing and singing along with the radio.

On July 8, 2013, at age fifteen, Jane gets her first job at the local Café Con Leche. She walks the four blocks to and from work twice a week. These small shifts are a stepping stone for Jane to gain more independence. Her employer describes her as a hard worker. Less than two weeks later, on July 17, she does not show up for the start of her shift. Her employer becomes concerned and calls her guardians, who tell him that she

has already left for work. When she finally arrives at work, Jane simply tells her boss that she has been with a friend.

Later that night, Jane confides to her adopted parents that she has been raped. Ramiro Sanchez, aged forty-three, approached her and asked her to come inside his apartment. Once inside, he disrobed, kissed, and raped her. He then took nude photos of her on his cell phone. After the attack, Jane quickly dressed and went to work, not knowing what else to do. Her parents immediately notify the police, they provide Sanchez's address and his description

Jane, her parents, and the community anxiously await an investigation and charges to be pressed. It is not until two days later that a rape kit is finally administered. Several days later, on July 26, the parents are appalled to still see Sanchez walking around free. They send out a chain email through the tightknit community describing the rape and rapist. On July 29, the community receives some reassuring news; a person reports seeing Sanchez being led out of his apartment by police. But just two days later he is released without any charges. They are told that the investigation is ongoing, but the community sees apathy and inattention. They are angry. A fifteen-year old-daughter of their community with Down's Syndrome has been raped, and she needs support.

Fifteen days after the rape on August 1, community leaders distribute flyers with a "Rapist Warning" and several pictures of Sanchez. Storefronts along the main street of the neighborhood put them up in their front windows. Tensions and frustrations continue to build and upon hearing that the rape kit has not yet even been processed by the state police, the community explodes. A Facebook thread on the incident has a post that states:

"ATTENTION/WARNING: this piece of shit u see in this flyer RAPED A 16 YR OLD GIRL IN OUR NEIGHBORHOOD !!! . . . me personally, if i seen him, id call the cops then i would beat the shit out of him myself till the cops arrive. I HATE WORTHLESS SCUM LIKE THIS. STAND UP FOR YOUR HOOD."³⁹

On Monday August 5 around 1 p.m., Sanchez is spotted walking along the main street. A man rides up on a bicycle, jumps off, and while beating the man shouts, "You like raping little girls?"⁴⁰ Sanchez manages to escape and run down the street where he is attacked by a larger group of people. The crowd kicks and beats him until police arrive. Sanchez is taken to the hospital where he is treated for injuries. Another post goes up on Facebook describing how "a friend of mine caught him" and claims that this was "GREAT NEWS FOR SOUTHWEST DETROIT... well...thanks to EVERYONE WHO SHARED THE FLYER AND SPREAD THE WORD."⁴¹

Wayne County Prosecutor Kym Worthy does not seek to arrest anyone in connection with the beatings. Jerome Warfield, a member of Detroit's civilian commission that oversees police says, "We do understand that the neighbors were enraged."⁴² He went on to warn though that "vigilantism cannot be accepted when you're impeding upon somebody's rights."⁴³ The community is torn between praising the actions of the vigilante mob who finally delivered some justice and condemning them as criminals themselves.⁴⁴ Although it is clear who participated in the beatings, no charges are ever brought.

We have previously noted other examples of prosecution decisions to not charge vigilantes. Recall George Zimmerman's killing of unarmed teenager Trayvon Martin, discussed in Chapter 9. No charges were filed by the local authorities until the

national press focused on the racial aspect of the case. The same was true in the case of Bernard Goetz unnecessarily shooting Darrell Cabey in the subway car and of the beating of Rodney King in Los Angeles, also discussed in Chapter 9. Whatever one may think of how the vigilantes should ultimately be dealt with, the potentially controversial circumstances suggest that at least some public examination of the events would be useful. Yet prosecutors regularly forgo filing charges unless forced to do so by media attention.

Prosecutor manipulation of the system works in reverse as well, overcharging rather than undercharging a case where the system has regularly failed to give an offender justice in the past. When they finally get hold of a justice-avoiding offender, it is not uncommon for prosecutors to seriously overcharge the violator's offenses or grossly exaggerate their claim of an appropriate sentence, justified in their minds by the system's past failures to do justice. Consider an example.

Prosecutorial Overcharging to Make up for Past Failures of Justice

Finally Getting Something on a Career Criminal. Edward Augustine, living in New Orleans, has had numerous run-ins with the police, but they rarely end in conviction and punishment.⁴⁵ He has a single conviction for attempted possession of a firearm with a controlled dangerous substance. He has been through the "revolving door" of the criminal justice system many times.⁴⁶ Police regularly arrest him on drug or weapons charges, but he will later be walked back out on the street. Sometimes it is because the police are unable to find witnesses willing to testify against him. In other instances, prosecutors do not proceed because at the time they have limited prosecution resources and "higher profile" cases in greater need of their efforts.⁴⁷

In 2008, the new District Attorney, Leon Cannizzaro, has a different attitude. Cannizzaro makes it office policy that no case is too insignificant to try and pursue. He makes it his mission to increase the percentage of cases his office will pursue from 50% to 90%.

On January 7, 2011, a New Orleans police officer observes a car make an unlawful right turn at a red light. The officer turns on his lights and siren to pull the car over, but the car speeds away. The officer follows the silver Sonata and, as he pulls up beside it, he sees the driver, Augustine, dumping white powder out of the car window. The officer believes the substance to be some form of illegal narcotics, and requests and receives permission to pursue the vehicle as necessary.

The officer chases Augustine for several blocks, but stops when Augustine enters a one-way street. Augustine accidentally hits another vehicle. Augustine flees. The officer pursues him on foot. As Augustine attempts to climb a fence in a nearby alley, the officer tases him and places him under arrest. Later, the passenger in the car that Augustine hit dies from his crash injuries.

Upon returning to the scene of the crash, the officer learns that Augustine has killed the passenger in the other vehicle, a college freshman who has just returned home for the Christmas holidays. The officer also finds numerous packages of heroin in Augustine's possession. It also comes to light that the car being driven by Augustine has been reported missing by its owner, the mother of Augustine's girlfriend.

District Attorney Cannizzaro is unhappy that this career criminal has been allowed to pass through the system on so many occasions without facing any serious punishment. He believes that by not aggressively prosecuting earlier narcotics cases, the system was

in effect “creating monsters.”⁴⁸ He is determined to pursue Augustine aggressively to try to make up for past failings of the office.

He charges Augustine with manslaughter for causing the death in the accident, for which Augustine ultimately gets, at his urging, a 50 year sentence. He also charges him with possession with intent to distribute illegal drugs – the drugs Augustine dumped out the window – and, again at his urging, Augustine gets an additional sentence of 50 years. Cannizzaro learns that the car that Augustine was driving belonged to his girlfriend’s mother. While he did not have her express permission to drive it on that occasion, the woman does not wish to press charges, but Cannizzaro does nonetheless, and thereby gets another 20 years added onto Augustine sentence, for a total sentence of 120 years – a sentence several times longer than what even an intentional murder would typically get.⁴⁹

In this form of shadow vigilantism by prosecutors (and judges), the officials feel morally justified in manipulating the system in order to compensate for past values of justice.

Prosecutorial overcharging is of two sorts: vertical overcharging, in which the prosecutor charges offenses for which he has insufficient proof to convict, and horizontal overcharging, in which he charges a series of overlapping offenses arising from the same criminal act.⁵⁰ In the latter type, prosecutors charge every offense for which a defendant might theoretically satisfy the offense definition, no matter how overlapping the offenses may be. Thus, a prosecutor might take a standard rape case – using force to compel intercourse – and add on “assault, kidnapping, gross sexual imposition, etc.”⁵¹ This is made possible because most American criminal codes, in which the state’s criminal laws are collected, have a vast collection of overlapping offenses,⁵² as legislatures have been constantly adding new offenses, sometimes making the code seven or eight times longer than its original Model-Penal-Code-based form but without substantially expanding its coverage.⁵³

The forests of overlapping offenses exist in large part because prosecutors have politically promoted them. Prosecutors have put political muscle into supporting a constant stream of new offenses that typically are just added on top of the old. To protect this ability to bring multiple charges, they have repeatedly opposed criminal code reforms that would streamline codes and eliminate unnecessary overlaps. For example, in a new criminal law codification was undertaken in Illinois in 2003, which had as one of its primary aims the consolidation of overlapping offenses,⁵⁴ the recodification was ultimately blocked by the political opposition of prosecutors.⁵⁵ The prosecutors sponsored instead a new reform commission that kept the redundancies in the current code.⁵⁶

Prosecutors’ moral justification for excessive charging might rest on any or all of several different claims, the same sorts of claims heard from police to justify their testilying: First, the criminal justice process has so many barriers to an offender getting the liability and punishment he deserves that such excess is needed just to end up with something that approximates what is really deserved.⁵⁷

Further, it makes sense to try to get more liability and punishment than an offender deserves for the case at hand because, given the gross ineffectiveness of the system, the offense at hand is probably just the tip of the iceberg of the offenses he has actually committed.⁵⁸

Finally, many people care little if the overcharging generates liability that is undeserved for both present and unpunished past offenses. That is not something that

ought to be a concern to prosecutors because the criminal justice system has given up any pretense about being a search for justice. It is simply a system of mutual combat between defense counsel and prosecutors, with winners and losers, the goal of which is to always win and never to lose. Just as defense counsel see their job as always getting the least punishment they can for their guilty clients, the prosecutors, in a symmetrical fashion, should see their job as getting as much as they can for guilty defendants.⁵⁹

Strategic overcharging might seem to the uninitiated to be too unethical to be done openly. But the increasing game-like features of the system have dulled participants' sensibilities. Indeed, one need only look at similar manipulative conduct by federal judges before the Sentencing Reform Act of 1984 stopped the practice. Federal law at the time required that all offenders be eligible for early release by the United States Parole Commission no later than after serving one-third of their sentence. Judges who bridled at this early release could, and did, short-circuit the system by simply determining the sentence they really wanted, then tripling it.⁶⁰ Thus, the offender would become eligible for release only after serving the full term the judge thought appropriate. Prosecutors may be making similar sorts of strategic manipulations when they overcharge.

It was in part this judicial manipulative practice that contributed to the enactment of the "truth in sentencing" provisions of the Sentencing Reform Act of 1984. People had become increasingly skeptical of the sentences that were publicly imposed because they always ended in early release. The new Act required that an offender serve at least 85% of the sentence imposed – an attempt to earn back some credibility for the system.

The Insidious Danger of Shadow Vigilantism

One might argue that the manipulations and subversions inspired by shadow vigilantism – of both the official sort discussed in this chapter and of the citizen sort discussed in the previous chapter – are not something that, as a practical matter, ought to be of significant concern. We can for the most part ignore these problems because they are only a minor part of the criminal justice process.

It is true that some forms of shadow vigilantism may not be very common. For example, it is hard to get good data on the rate of shadow-vigilante-inspired jury nullification. But it is probably also true that shadow-vigilante-inspired subversions of the system that arise later in the adjudication process are sometimes limited in number only because of shadow-vigilante-inspired subversions earlier in the process, such as by citizens' refusal to report or cooperate with the investigation of vigilante crimes, or by testilying by police officers, or by declinations by prosecutors to prosecute. That is, the rate of shadow-vigilante-inspired subversions later in the process, by jurors, prosecutors, or judges, might be dramatically higher if the cases for which shadow vigilantes have sympathy are not already subverted earlier in the process.

This is especially true in serious cases where the failure of justice would be spectacular if the system had not been manipulated by shadow vigilantes, since it is these cases in particular where the shadow vigilante impulse will be at its greatest. (Interestingly, then, it is shadow vigilantism that in some ways may be saving some of the justice-frustrating doctrines from themselves, by taking the edge off the credibility loss that the system would otherwise suffer if it were not subverted.)

An even better reason to take shadow vigilantism seriously is found in social psychology's insight that motivation is everything in setting a reputation.⁶¹ All that is needed to provoke the shadow vigilante's conclusion that the system is indifferent to the

importance of doing justice is an occasional headline case in which such apparent indifference is shown. When the outrageous failure of justice occurs, yet there is no indication that anyone is to be sanctioned for causing it, it becomes clear to the public that the outrageous result is authorized and approved by the system – it is how the system is supposed to work. With the system's apparent indifference established in this headline case, the observer can then easily assume that the same indifference motivates the system's decisions in the many other cases about which the observer never hears the details.

Finally, and most importantly, it is not the failure of justice itself that does the most serious damage to the system's credibility but rather the threat of it, for this is what creates the shadow vigilante impulse. That is, it is the potential of a rule or practice to produce gross failures of justice that calls for the rule's or practice's subversion. The police would still testily to avoid a failure of justice *even if they had been successful in avoiding such failures in every instance in the past*. It is not the frequency of an outrage that is most important – each outrage is just an instance of their failure to prevent it through subversion – but rather the perceived threat of the outrage. If the threat of a serious failure of justice exists, so will the impulse to prevent it.

Why Shadow Vigilantism Is More Dangerous and Destructive Than Classic Vigilantism

Indeed, it seems clear that shadow vigilantism is much more dangerous and destructive to the criminal justice system than classic vigilantism, for several reasons. First, the effect of shadow vigilantism is less dramatic but more pervasive. Shadow vigilantism appeals not just to the unusual person or group willing to be a classic vigilante – willing to openly violate the law in serious ways – but also to more ordinary people. Many people who cannot bring themselves to explicit lawlessness *can* bring themselves to undermine and subvert, through non-cooperation, lying, or other lower-level misconduct, a system that they see as being immorally indifferent to serious wrongdoing. Imagine all the neighbors in the Chapter 8 cases who refused to help authorities pursue the classic vigilantes. As we asked in Chapter 8: If those neighbors were sitting on a jury for those vigilantes, would they be likely to vote to acquit? If they were the grand jurors or prosecutor in the case, would they want to avoid bringing charges? If they were voting on a proposal to change the rules that led to the failure of justice, would they vote for the change and for a politician who supported the change? It seems highly likely that they would do so in all these instances. The fact that an entire neighborhood can show its willingness to succumb to a shadow vigilante impulse shows the potential sweep of the problem.

Further, shadow vigilantism is more problematic than the classic form because the criminal justice system cannot effectively deter it in the way it can classic vigilantism. The shadow vigilantes' conduct may be criminal in some cases, but it also may be only unethical or obviously unjust or unfair in others. The failure to report a crime or to assist investigators commonly is not a crime in the U.S.⁶² And even if it is criminal, it cannot be effectively deterred. Even if the shadow vigilantes' actions are not morally justified (under Chapter 5 rules), they may well believe that they are.⁶³ They probably see themselves as civil disobedience protesters might see themselves: they know that what they are doing is inconsistent with the law in spirit if not in letter, but they see the violation as morally justified by the law's own immorality in its indifference to doing justice.

Worse, while shadow vigilantism cannot be as effectively deterred as classic vigilantism, it is at the same time even more damaging than the latter. The classic vigilantism, by operating openly, serves as a public protest against the system's failures of justice – a call to the system to correct itself. In contrast, shadow vigilantism is generally unseen: jury nullification, improper exercise of discretion in changing, sentencing and other criminal justice decisions, political support for unjust punishment policies. It provides no public call for reform, but instead seeks to remain in the shadows

Further, it introduces into the criminal justice system serious arbitrariness and disparity among cases. The level of shadow vigilantism in any given case may be unpredictable, dependent as it is on a variety of factors. And the resulting arbitrariness and disparity only contribute in the long run to the system's reputation as being less predictable, more arbitrary, and more unjust. In other words, shadow vigilantism only serves to exacerbate the system's moral credibility problem that triggered it. It invites a downward spiral of lost credibility and therefore increased subversion.

In fact, the destructive dynamic of the downward spiral is even worse than this, as the next chapter details.

NOTES

¹ This narrative was compiled from: *People v. Bradford*, 939 P.2d 259, (S. Ct. California 1997).

² *People v. Bradford*, "Cheryl V., Section E.."

³ *People v. Bradford*, "3. Disappearance of Tracey Campbell."

⁴ *People v. Bradford*, "6. Defendants Second Arrest."

⁵ *Ibid.*

⁶ *Ibid.*, "2. Defense Case."

⁷ For more details, see the Postscript.

⁸ *United States v. Sheard*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ George C. Thomas III, "Lost in the Fog of Miranda," *Hastings Law Journal*, Vol. 64, Issue 5, 2013, 1501.

¹² Alan Dershowitz, *The Best Defense*, (New York, NY: Random House) 1982, xxi.

¹³ Michelle Alexander; "Opinion: Why Police Lie Under Oath," *N.Y. Times Sunday Rev.*, Feb. 2, 2013, 4, quoting Peter Keane, SF Police Commissioner: "Police officer perjury in court to justify illegal dope searches is commonplace. One of the dirty little not-so-secret secrets of the criminal justice system is undercover narcotics officers intentionally lying under oath. It is a perversion of the American justice system that strikes directly at the rule of law. Yet it is the routine way of doing business in courtrooms everywhere in America."

¹⁴ Larry Cunningham, "Taking on Testilying," in *Crime & Justice in America: Present Realities and Future Prospects*, Second Edition, eds. Wilson R. Palacios, Paul F. Cromwell, and Roger G. Dunham (Saddle River, NJ: Prentice-Hall, 2002)

¹⁵ Cunningham, "Taking on Testilying."

¹⁶ David Kocieniewski, "NY Pays a High Price for Police Lies," *N. Y. Times*, Jan. 5, 1997.

¹⁷ Kocieniewski, "NY Pays a High Price."

¹⁸ Jon Loevy, "Truth or Consequences: Police 'Testilying' ", *ABA Litigation*, 36 *Spring 2010*, 13-14, *citing* Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 *U. Chi. L. Rev.* 1016 (1987).

¹⁹ Myron W. Orfield, Jr., "Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts," 63 *U. Colo. L. Rev.* 75, 83 (1992)

²⁰ Milton Mollen, *Commission to Investigate Allegations of Police Corruption and the Anti-corruption Process of the Police Department*, New York City, 1994.

²¹ Mollen, "Commission to Investigate Allegations," 36.

²² *Ibid.*, 38.

²³ *Ibid.*, 38.

²⁴ *Ibid.*, 38.

²⁵ Wayne Pethrick and Brent E. Turvey, "Cognitive Ethos of the Forensic Examiner", in *Forensic Criminology*, Wayne Pethrick, Brent E. Turvey, and Claire E. Ferguson eds. (Burlington, MA: Elsevier, 2010), 118.

²⁶ Loevy, "Truth in Consequences", 29.

²⁷ Case Comment, "Effect of *Mapp v. Ohio* on Police Search and Seizure Procedures in Narcotics Cases," 4 *Columbia J. Law & Soc. Probs.*, Vol 87, 1968, 94-95.

²⁸ Nick Malinowski, "Testilying: Cops Are Liars Who Get Away With Perjury,"

Vice.com, March 2013,

<http://www.vice.com/read/testilying-cops-are-liars-who-get-away-with-perjury> .

²⁹ Alan Dershowitz, "A Police Badge is Not a License to Commit Perjury," *San Diego Union-Trib.*, Apr. 4, 1991, B11.

³⁰ Myron W. Orfield, Jr., "Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts," *U. Colo. L. Rev.* 75, Vol. 63, 1992.

³¹ This narrative was compiled from Edecio Martinez, "Cash Rewards For Philly Rape Mob," *CBS News*, June 11, 2009, <http://www.cbsnews.com/news/cash-rewards-for-philly-rape-mob/>; Allison Steele, "Man Beaten by Kensington Mob Pleads Guilty in Rape of Girl," *The Inquirer*, Aug. 12, 2010; http://articles.philly.com/2009-06-04/news/25284674_1_vigilante-justice-street-justice-jose-carrasquillo; Associated Press, "Man Suspected of Raping 11-Year-Old Girl Stable After Neighborhood Mob Takes Justice Into Own Hands," *NY Daily News* (June 4, 2009) <http://www.nydailynews.com/news/world/man-suspected-raping-11-year-old-girl-stable-neighborhood-mob-takes-justice-hands-article-1.372753>.

³² Martinez, "Cash Rewards For Philly."

³³ *Ibid.*

³⁴ Steele, "Man Beaten by Kensington Mob."

³⁵ Martinez, "Cash Rewards For Philly."

³⁶ *Ibid.*

³⁷ This narrative was compiled from the following sources: Gus Burns, "Ramiro Sanchez Gets 6-Plus Years for Rape of Girl With Down Syndrome That Enraged Southwest Detroit," *Mlive*, Mar. 28, 2014, http://www.mlive.com/news/detroit/index.ssf/2014/03/ramiro_sanchez_gets_6-plus_years.html ; Erin Cawthon, "Detroit Man Beaten After Neighbors Say He Raped Teen, Cite Slow Police Response," *CNN*, Aug. 14, 2013, <http://www.cnn.com/2013/08/14/us/michigan-suspect-beaten/> ; Jim Schaefer, "Detroit Neighborhood Takes Vigilante Action Against Rape Suspect," *Detroit Free Press*, Aug. 11, 2013, <http://www.freep.com/article/20130811/NEWS01/308110005/hubbard-farms-rape-vigilante-justice-assault-teenage-girl> .

³⁸ Schaefer, "Detroit Neighborhood Takes Vigilante Action."

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Cawthon, "Detroit Man Beaten."

⁴³ *Ibid.*

⁴⁴ One comment on a local forum states, "so it's OK to take the law into your own hands? And the people who beat him up weren't arrested?" Schaefer, "Detroit Neighborhood." While another in response states "Why is that even relevant? There should be No mercy. No compassion for the evil & wicked." *Id.*

⁴⁵ This narrative is compiled from *State v. Augustine*, 125 So. 3d 1203 (La.App. 4 Cir. 2013); Eyewitness Morning News, "DA Frustrated By Revolving Door of Local Criminal Justice System," *WWL TV*, Jan. 12, 2011, <http://www.wwltv.com/eyewitness-morning-news/DA-Frustrated-by-revolving-door-of-local-criminal-justice-system-113346474.html>) .

⁴⁶ Eyewitness Morning News, "DA Frustrated."

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Cannizzaro is able to procure such a lengthy sentence because he asks the court to apply the habitual offender law, which increases penalties for individuals with prior felony convictions. In Louisiana, if the prosecutor determines a defendant should be charged under the habitual offender law and a jury finds them guilty, the judge's hands are tied and they must impose the strictest sentences possible. Augustine appeals his lengthy sentence, but the appellate court affirms his 120 year sentence.

(<https://casetext.com/case/state-v-augustine-50>)

⁵⁰ Kyle Graham, "Overcharging," 12 *Ohio St. J. Of Crim. Law.*, Vol 11, No. 1, 2014, 72.

⁵¹ Douglas A. Berman, "Sentencing Law and Policy: an Affiliate of the Law Professor Blogs Network," Mar. 19, 2013, http://sentencing.typepad.com/sentencing_law_and_policy/2013/03/overcharging.html (responding to the abstract posting of Graham, "Overcharging.")

⁵² For example, in the Illinois criminal code:

Chapter 720 includes narrow, specific offenses in addition to a broader prohibition against such conduct generally. For example, although one provision in current Chapter 720 covers theft generally, a number of other provisions in Chapter 720 prohibit the same underlying conduct — theft by taking (or its attempt) — in the context of specific circumstances or forms of property. The same situation exists for assault offenses and property damage offenses. Similarly, in addition to its general perjury offense, current Illinois law contains numerous offenses criminalizing false statements made under oath or affirmation about particular matters, in particular documents, and in particular proceedings.

"Final Report of the Illinois Criminal Code Rewrite and Reform Commission," at xli (footnotes omitted). Kirk Dillard, a Republican state senator from Hinsdale, and a member of a later commission, acknowledged that lawmakers sometimes push for redundant measures in response to crimes within their districts. Dillard states, "[E]ven though there may have been five or six other ways to charge that individual who did something at a particular legislative district with a crime, the legislator always wants to add a new one for a lot of reasons, including public-relations purposes... We all add to the criminal code, and it turns into a hodge-podge." Mike Ramsey, "Panel tackles rewrite of state's criminal code," *Copley News. Serv.*, Dec. 13, 2004.

⁵³ See "Final Report of the Illinois Criminal Code Rewrite and Reform Commission," Vol. 1 at xix (August 2003) ("The sheer verbiage of current law is one indication of its failure to consolidate similar offenses...Overall, the Proposed Code's Special Part uses only 14.9 percent - less than 1/6 - of the words in the code's special Part, and only 6.7 percent - about 1/15 - of the current Special Part plus other, non-criminal code statutory felonies."); "Final Report of the Kentucky Penal Code Revision Project of the Criminal Justice Council," Vol. 1, July 2003, xxix ("[N]early three decades of piecemeal modification of the Code have led to the addition of hundreds of new offenses, many of which cover the same conduct as previous offenses"). See also, Paul H. Robinson and Michael T. Cahill, "The Accelerating Degradation of American Criminal Codes," *Hastings L. J.* Vol. 56, 2005, 635-636 ("One might expect that over time, as more loopholes or omissions in a code are eliminated, there would be a reduced need to alter or expand that code, but historical trends demonstrate that the opposite is

true...the Illinois Code underwent nearly twice as many amendments in its second twenty years of existence than in its first twenty years.").

⁵⁴ The Commission's Report explained that "the drafters have aimed to consolidate offenses. Perhaps inevitably, four decades of piecemeal modification of the 1961 Code have led to the addition of hundreds of new offenses, many of which cover the same conduct as previous offenses or appear in various other chapters of the Illinois Compiled Statutes rather than in the criminal code." "Final Report of the Illinois Criminal Code Rewrite and Reform Commission," August 2003, at v-vi.

⁵⁵ Joseph Birkett, the most vocal prosecutor opposing the Criminal Code Rewrite and Reform Commission work contended that "many of the special provisions and enhanced penalties are needed." John Patterson, "Are we too tough on crime? Politicians' fear of appearing soft creates avalanche of laws," *Chi. Daily Herald*, Apr. 1, 2001. A Republican member of the Illinois House of Representatives and a member of the CLEAR commission (the prosecutor-sponsored successor to the original CCRRC), James B. Durkin, has acknowledged that, "[P]rosecutors are hesitant to change." Rep. James B. Durkin, "Court Reform Commentary," *Chi. Trib.*, June 27, 2000, 12. Gino DiVito, a former Illinois appellate judge who co-chaired the CLEAR commission, found that the code's illogic stems from laws passed to address a specific crime or a constituent complaint, without examining how the new law fits within the overall state code. "The code reform project had barely gotten off the ground when prosecutors expressed their opposition and were unwilling to devote manpower or resources to assist in the project, even though their participation would have assured them a voice within the decision-making group." Robinson, "The Accelerating Degradation," 649.

⁵⁶ The 1,100-page bill emanating from the Criminal Law Edit, Alignment and Reform ("CLEAR") Commission, inter alia, declined to recommend narrowing the number of circumstances that can activate the charge of aggravated battery. They also declined to eliminate anachronistic offenses such as adultery and fornication. Though, the last successful prosecution for fornication occurred in 1913, while the charge of adultery was last aired in criminal court in the early-1960s. Mike Ramsey, "Is that CLEAR? Legal panel hopes so," *Copley News Serv.*, Dec. 29, 2006.

⁵⁷ Graham, "Overcharging", 705.

⁵⁸ *Idid.*, 709.

⁵⁹ Richard A. Oppel Jr., "Sentencing Shift Gives new leverage to Prosecutors," *N.Y. Times*, Sept. 25, 2011.

⁶⁰ S. Rep. No. 225, at 46-47 ("Sentencing judges, trying to anticipate what the parole commission will do, undoubtedly are tempted to sentence a defendant on the basis of when they believe the parole commission will release him ... in doing so, some judges deliberately impose sentences above the parole guidelines, leaving the parole commission to set the presumptive release date... other judges impose sentences consistent with or below the guidelines in order to retain control over the release date.").

⁶¹ Paul Robinson and John Darley, "The Utility of Desert," *NW. U. L. REV.*, Vol 91, 1997, 496.

⁶² It can be a crime to lie to police or to refuse to answer questions before a grand jury. See, e.g., *Brown v. United States* 359 U.S. 41 (1959) (finding contempt where a witness refused to answer before a grand jury on grounds of self-incrimination privilege despite being granted immunity); but see *Harris v. United States*, 382 U.S. 162 (1965) (Identifying a similar scenario where criminal contempt was not appropriate); Fed. R.

Crim. P. 42 (a,b) (Criminal Contempt); 18 Pa. C.S.A. § 4906 (False Reports to Law Enforcement Authorities). But shadow vigilantes can usually avoid committing such offenses simply by saying nothing to investigators in the first place and never drawing attention to themselves that might put them before a grand jury.

⁶³ Almost by definition, the shadow vigilante cannot meet the rules for the moral vigilante as laid out in Part III: they typically do not give prior warnings, as rule 6 requires; typically do not report afterwards what they have done and why, as rule 9 requires; and also commonly are each acting alone, as rule 8 forbids. However, a group might be formed to coordinate activities in ways that might come closer to meeting Part III's rules. An organization might publish guidelines and advice about what shadow vigilante actions people should take and why, and to report what is done and why.